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In the

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA

Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF Kentucky, Arizona, California, Connecticut, Indiana, Kansas, Louisiana, Maryland, Commonwealth of Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Commonwealth of Pennsylvania, Wyoming, and Territory of American Samoa IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case is of interest to the amici states because they have significant and compelling governmental concerns which must be considered in determining what process is due when real property, subject to forfeiture based on violations of drug laws, is seized. This case presents the important issue of whether the Due Process Clause of the Fifth Amendment requires notice and an opportunity to be heard *before* such real property is seized, where the seizure is made pursuant to a warrant based upon a finding of probable cause by a neutral and detached magistrate.[1]

As the Court has previously observed, the distribution and use of illegal drugs in our country is "one of the greatest problems affecting the health and welfare of our population." *Treasury Employees v. Van Raab*, 489 US 656, 668 (1989). The forfeiture of real property used in the illicit drug industry is but one part of the effort by the states and the federal government to combat this most serious problem. The states bear a heavy financial burden in directly fighting the illicit drug industry, not to mention the costs of the collateral damage of illegal drugs. Federal and State forfeiture laws provide a way to attack drug trafficking by removing real property assets which facilitate the illicit drug industry. The forfeiture of real property used in the illicit drug industry serves to remove the incentive to engage in a criminal activity motivated by the prospect of incredible monetary rewards. Forfeiture also helps to control the harms posed by real property used in drug trafficking such as crack houses. Forfeiture is also a mechanism to compensate, at least in

[1]The states, in this brief, address only whether the Due Process Clause of the Fifth Amendment requires preseizure notice and hearing before real property may be seized for forfeiture. The amici states do not address the second question presented in this case of whether the provisions of the federal customs laws, 19 U.S.C. § 1602-1604, establish a statutory basis for dismissal of a federal forfeiture action where the five year limitations period in 19 U.S.C. § 1621 has been satisfied.

part, the states for the direct and indirect costs of the illegal drug industry since the states bear not only the costs of enforcement but also the attendant costs of testing, caring for, and rehabilitating the victims of the illegal drug industry.

Should the Court conclude that the Due Process Clause of the Fifth Amendment mandates notice and an opportunity for a hearing before real property may be seized for forfeiture, the implementation of both federal and state forfeiture statutes will be impaired. In recognition of the critical role of state and local law enforcement officials in combatting the illicit drug industry, Congress has provided that property forfeited pursuant to the federal statute may be transferred "to any state or local law enforcement agency which participated in the seizure or forfeiture of the property, ..." 21 U.S.C. § 881(e)(1). As one observer has noted, the 1984 and 1986 amendments authorizing the sharing of forfeited assets has been used extensively and has financially benefitted local police and other local law enforcement agencies.[2] The amici states believe that requiring notice and hearing before real property subject to forfeiture may be seized would seriously impair the ability to target the real property assets of the illegal drug industry under the federal civil forfeiture statute.

The amici states also believe that this unwarranted interpretation of the Due Process Clause of the Fifth Amendment advanced by respondent, and adopted by the Ninth Circuit, seriously impairs the ability of the states to target the real property assets of the illegal drug industry under their own state forfeiture statutes. In every state but one civil forfeiture provisions have been enacted

[2]Michael Zander, *Confiscation and Forfeiture Law*, at 31, (The Police Foundation 1989).

as part of an anti-drug effort.[3] Forty-three of the states have statutes permitting the forfeiture of real property used in the illegal drug trade.[4] The use of forfeiture as a tool to combat criminal activity has been long used by the states. The various colonial governments enacted forfeiture statutes even before the American Revolution. While the present state forfeiture statutes vary from the detailed to the more general,[5] such legislation reflects a decision by the various states to utilize the forfeiture laws as part of their effort to fight the invasion of the illicit drug industry. Any decision by this Court as to what process is due when real property subject to forfeiture is seized will have direct consequences for the states' anti-drug efforts under both the federal and state forfeiture statutes.

Forfeiture is a critical remedy which the states have an interest in seeing applied to the profit-driven illicit drug industry. Whether the subject of the real property to be forfeited is an urban crack house or a rural farm growing, processing, and storing marijuana, the goal is the same - to remove criminal assets indispensable to the commission of drug offenses. In light of the compelling societal interests at stake, when real property is seized subject to forfeiture for violation of drug laws prior notice and hearing is not mandated as a matter of federal constitutional law, the amici states submit.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fifth Amendment does not require preseizure notice and hearing since the states' compelling interest in fighting the illicit drug

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[3]United States Department of Justice, *Sourcebook of Criminal Justice Statistics, 1990*, at 142.

[4]*Id*. at 144.

[5]Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 Columbia L.Rev. 390, 392 (1988).

industry outweighs any personal interest in the real property. Due process of law is, of course, a flexible concept that varies with the particular situation. Preseizure notice and hearing is not constitutionally mandated since the seizure of the real property assets of the illicit drug industry: 1) fosters the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions; 2) preseizure notice and hearing would frustrate the purposes of the forfeiture statutes since the property could be destroyed or law enforcement officers placed in danger; 3) and the seizure is initiated by government officials and not self-interested private parties. *Calero - Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

The initial seizure of the real property assets of the illicit drug industry is limited only by the requirements of the Fourth Amendment. Where, as here, the initial seizure of the real property subject to forfeiture is pursuant to a warrant based upon a finding of probable cause, the Fourth Amendment's requirement of reasonable seizures is satisfied. Surely, if the government may seize a *person* based upon a finding of probable cause to believe that the person has committed a serious offense, then the government may seize *property* based upon a finding of probable cause to believe that the property is connected to the illicit drug industry. *See, United States v. Monsanto*, 491 U.S. 600 (1989).

The forfeiture of property used in criminal activity is a principle of law that has been recognized from biblical times, at English common law, and in the laws of this country. Over one-hundred years ago the Court upheld the forfeiture of a landlord's personal and real property due to the tenant's operation of an illegal distillery. *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878). Today, federal and state statutes authorizing the forfeiture of the real property assets of the illicit drug industry serve the same purposes as the statute in *Dobbin's Distillery* - to prevent the further illicit use of the property and to impose an economic sanction. Federal and state

forfeiture laws are one way the public can strike back, through their government, at the illicit drug industry.[6]

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT REQUIRE NOTICE AND HEARING BEFORE THE GOVERNMENT MAY SEIZE FOR FORFEITURE THE REAL PROPERTY ASSETS OF THE ILLICIT DRUG INDUSTRY.

A. The Due Process Clause Of The Fifth Amendment Does Not Require Preseizure Notice And Hearing Since The States' Compelling Interest In Fighting The Illicit Drug Industry Outweighs Any Personal Interest In The Real Property.

Due process is, of course, a flexible concept that varies with the particular situation. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Brock v. North Carolina*, 344 U.S. 424 (1953). The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB*

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[6]Illegal drug production was the conduct giving rise to the forfeiture in this case, and the illicit drug industry is the largest and most powerful illicit industry. However, forfeiture of property is an important part of social strategies to control other financially motivated anti-social conduct as well, ranging from environmental crimes and pure food and drug violations to fraud to the classic organized criminal rackets enumerated in federal and state anti-racketeering laws.

v. Mackay Co., 304 U.S. 333, 351 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 US 886, 895 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

Recognizing the flexible nature of due process of law, the Court rejected an argument that preseizure notice and an opportunity for a hearing was constitutionally mandated by the Fifth Amendment before a yacht believed to have been used to transport drugs was seized by the government. *Calero - Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In rejecting the argument that due process required preseizure notice and hearing the Court considered three factors: 1) seizure of the property subject to forfeiture permits the government "to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions"; 2) "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized - as here a yacht - will often be of a sort that could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given"; and 3) unlike the situation in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the "seizure is not initiated by self-interested private parties" but by government officials. *Calero - Toledo*, 416 U.S. at 679. The same analysis applies to this case, and leads to the same result - no preseizure notice and hearing is constitutionally required.

Consideration of these three factors demonstrate that there are compelling government interests at stake which tilt the balance in favor of seizure without prior notice and hearing. Given the health risks posed by illegal drug use and the very real threat of violence accompanying the drug trade, the government has a compelling interest in seizing real property associated with the illicit drug industry in an effort to protect the public's health and general welfare. Surely, the need to control

the illicit drug industry stands on equal footing with the government's need to confiscate contaminated food or misbranded drugs.[7] The government's interest in attacking the illicit drug industry for the good of the public welfare outweighs any individual's interest in real property associated with the illegal drug industry.

The states' interest in protecting the health and safety of its citizens is advanced by not requiring the government to delay its seizure of real property associated with the drug industry until after notice and an adversarial hearing can be provided. Real property associated with the illegal drug industry poses a significant threat to the public. Real property associated with the drug industry, such as crack houses, attract drug users who are likely to commit criminal acts. Drugs "relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. See, Goldstein, Drugs and Violent Crime, in Pathways to Criminal Violence 16, 24-36 (N. Weiner, M. Wolfgang eds., 1989)." *Harmelin v. Michigan*, 111 S.Ct. 2680, 2760 (1991) (O'Connor, J., concurring). The illegal drug trade harms not only the individual user of drugs but also creates a very real threat to the public welfare given the "direct nexus between illegal drugs and crimes of violence." *Id.* The holding of the court below - that seizure must be delayed until notice and an adversarial hearing is provided - frustrates the governmental interest in protecting the welfare and safety

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[7]Procedural due process is not denied when the postponement of notice and a hearing is necessary to protect the public from misbranded drugs, *Ewing v. Mytinger & Casselberry Inc.* 339 U.S. 594 (1950), from contaminated food, *North America Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), from a bank failure, *Coffin Bros. & Co. v. Bennett*, 227 U.S. 29 (1928), or to aid the collection of taxes. *Phillips v. Commissioner*, 283 U.S. 589 (1931).

of its citizenry by seizing real property associated with the illicit drug industry.

The use of the forfeiture laws also encourages lessors of real property to exercise greater care when transferring possession of the real property. *Calero - Toledo*, 416 U.S. at 687-688. The possibility of the forfeiture of the real property has the desirable effect of inducing property owners to exercise greater care when transferring possession of the property so that the property does not become, for example, a crack house. Similarly, the possibility of forfeiture serves to discourage property owners who would abandon their real property.

The giving of preseizure notice and a hearing would also frustrate the interests served by the drug forfeiture statutes. Admittedly, real property can not be removed or concealed. Real property is, nevertheless, "often ... of a sort that could be ... destroyed ... if advance warning of confiscation were given." *Calero - Toledo*, 416 U.S. at 679. A drug trafficker who is first informed of the government's intention to take his real property could certainly decide to destroy or damage that property rather than relinquish his property to the government to help finance law-enforcement activities. A notice of lis pendens filed at the local courthouse is hardly an effective deterrent sufficient to protect the government's interest in the real property against a gallon of gasoline and a book of matches in the hands of a disgruntled drug trafficker who would rather see the property go up in flames rather than be used to help fund anti-drug efforts.

There is still another compelling state interest against requiring preseizure notice and hearing for real property assets. As the Court has previously observed, those involved in the illicit drug industry "do not hesitate to use violence to protect their lucrative trade and avoid apprehension." *Treasury Employees v. Von Raab*, 489 U.S. 656, 669 (1989). The threat of violence against law enforcement officers in their efforts against the illicit drug industry is a very real one which can mean the difference

between life and death for those officers. While Good dismisses such concern as "farfetched," (Respondent's Brief in Opposition, p.9), the incredibly violent nature of the drug business calls for a recognition of the need for law enforcement officers to move quickly and without prior announcement. The decision to seize an urban crack house or a rural drug lab without prior notice is just the sort of decision that is best left to the discretion of law enforcement officers who are in the best position to size up the threat posed to them.

Law enforcement officials move quickly and without prior notice when they enter houses and real property associated with the illegal drug trade for the obvious reason that they seek to minimize the threat of physical harm or death to themselves or others. Indeed, "... courts have recognized the high level of violence associated with the drug distribution business...." *United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991). As the Second Circuit has observed, "[e]xperience ... has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade ...." *United States v. Wiener*, 534 F.2d 15, 18 (2nd Cir. 1976). The threat posed by those associated with the illegal drug industry to law enforcement officers in this country - whether those individuals are users or dealers of drugs - is not idle speculation. In the ten year period from 1980 through 1989 22% of the persons who killed a law enforcement officer in this country had at least one prior arrest on a drug law violation.[8] The threat of physical injury or death to law enforcement officials is a very real one. Notice and an adversarial hearing should be required as a matter of fundamental due process only *after* the real property is seized and secured given the inherently violent nature of the illegal drug industry.

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[8]United States Department of Justice, *Sourcebook of Criminal Justice Statistics, 1990*, at 397.

Finally, turning to the third consideration of *Calero-Toledo*, such seizures are ones initiated by government officials and not self-interested private parties. Accordingly, this case does not present a situation where there has been an abdication of government power. *See*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The seizure, by the government, of real property associated with the illicit drug industry hardly presents a situation like that where "[p]rivate parties, serving their own private advantage, may unilaterally invoke state power ...." *Fuentes v. Shevin*, 407 U.S. at 93.

Given the compelling governmental interests at stake when the government seeks to seize real property subject to forfeiture for violation of drug laws, fundamental due process should not require the seizure to be delayed until after notice and an adversarial hearing is provided. The Ninth Circuit erred when it held otherwise.

B. The Initial Seizure Of The Real Property Assets Of The Illicit Drug Industry Is Limited Only By The Requirements Of The Fourth Amendment.

The Ninth Circuit distinguished this case from this Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) on the ground that *Calero-Toledo* involved a yacht and not real property. That distinction simply does not support the Ninth Circuit's holding that Good was entitled, as a matter of fundamental due process, to notice and an adversarial hearing *before* the government could seize his real property subject to forfeiture for violation of the drug laws. The Ninth Circuit relied on the second *Calero - Toledo* factor to reach its holding on the basis that the second factor is inapplicable to real property, which cannot be moved. However, the second factor in *Calero - Toledo* only pointed out the property will "often" be such that it could be removed, destroyed, or concealed. The Ninth

Circuit also failed to give adequate consideration to the governmental interests at stake.

Given the compelling governmental interests at stake when real property subject to forfeiture is seized, preseizure notice and an adversarial hearing was not required as a matter of fundamental due process. Without question, the Court has recognized the privacy interests of citizens to be free from governmental intrusion in their homes absent a warrant. *Payton v. New York*, 445 U.S. 573, 590 (1980), *United States v. Karo*, 468 U.S. 705, 714 (1984). The initial seizure of Good's real property took place within the confines of the Fourth Amendment since it was done pursuant to a warrant supported by a finding of probable cause by a neutral and detached magistrate. The holding of the Ninth Circuit that something more was required prior to the seizure as a matter of fundamental due process, beyond that required by the Fourth Amendment, was error.[9]

In this case, respondent's real property was initially seized by federal authorities pursuant to a warrant issued by a United States Magistrate Judge of the United States District Court for the District of Hawaii. The warrant was based upon a sworn affidavit of a federal agent setting forth the drugs and drug paraphernalia uncovered by state law enforcement officers in their earlier search of Good's property and on Good's plea of guilty in state court. The initial seizure of Good's real property, the states believe, easily passes constitutional muster since

[9]The application of the Fourth Amendment to seizures for forfeiture is analogous to its application to seizures in furtherance of the tax laws. *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). As the Court observed, the seizure of property without a warrant not involving "any invasion of privacy" did not violate the Fourth Amendment. *G.M. Leasing*, 429 U.S. at 351-352. Where, however, the intrusion is upon a protected privacy interest, a warrant is required unless the case falls within one of the exceptions to the warrant requirement. *G.M. Leasing*, 429 U.S. at 352-353.

it was based upon a determination of probable cause to believe that Good had used his real property for illicit drug activities.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The proscription of the Fourth Amendment against *unreasonable* searches and seizures "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, ..." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Since the warrant in this case authorizing the seizure was based upon a finding of probable cause, the requirement of the Fourth Amendment that seizures by the government be *reasonable* was satisfied.[10] The seizure warrant obtained by the government in this case served the policy behind the Fourth Amendment since it provided "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[11]

[10]The warrant is prima facie proof that the law enforcement officers acted reasonably in conducting the search or seizure since "[o]nce the warrant issues, there is literally nothing more that the policeman can do in seeking to comply with the law." *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring).

[11]The Ninth Circuit failed to give any weight, in its analysis, to the procedural safeguard of a seizure warrant issued by a neutral and detached magistrate. The seizure warrant procedure is a mechanism by which the government's need to act is reviewed by a neutral and detached magistrate who can fashion the limits of the seizure warrant to those reasonably necessary to accomplish the seizure of the property subject to forfeiture.

The Court's decision in *United States v. Monsanto*, 491 U.S. 600 (1989) supports the conclusion that the showing of probable cause was sufficient to support the initial seizure in this case. In *Monsanto* the Court upheld a pretrial order in a federal criminal case barring the defendant from transferring property (including real property in the form of a home and apartment) prior to trial. The Court acknowledged that "[w]e have previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." *Monsanto*, 491 U.S. at 615. Relying on the decisions in *United States v. $8,850*, 461 U.S. 555 (1983) and *Calero - Toledo v. Pearson Yacht Leasing Co., supra*, the Court held that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id.*

Indeed, the Court went on to observe that "it would be odd to conclude that the Government may not restrain property, such as the house or apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." *Monsanto*, 491 U.S. at 615-616 (Citing *United States v. Salerno*, 481 U.S. 739 (1987)). The Court went on to recognize that a restraint of the property, based upon a showing of probable cause, would serve to "protect the community's interest in full recovery of any ill-gotten gains." *Monsanto*, 419 U.S. at 616.

The same rationale is just as applicable in this case. There existed in Good's case evidence well beyond the probable cause standard that he had used his home to carry out his illicit drug activities. Surely, as the Court pointed out in *Monsanto*, if the government may seize Good's person upon a showing of probable cause to believe he has committed a criminal drug offense, the government may also seize Good's real property upon a

showing of probable cause to believe that the real property was associated with drug trafficking. Such seizures further the states' interest in securing for forfeiture the real property assets of the illicit drug industry. As in *Monsanto*, such seizures "protect the community's interest in full recovery of any ill-gotten gains." *Monsanto*, 419 U.S. at 616. Once the public's interest in the property is secured by the initial seizure, the government may then elect to permit any tenants to remain on the property with rents to be paid to the government as was done in this case, or enter into a "residency agreement" which restricts the owner's ability to alienate the house, makes the owner liable for any damage, and permits the government to inspect the property. *Application of Kingsley*, 802 F.2d 571, 579 (1st Cir. 1986).

Good received that to which he was entitled when his real property subject to forfeiture was initially seized - a determination of probable cause "decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, ..." *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). This Court should reject the effort to impose additional limits, beyond those imposed by the Fourth Amendment, upon the initial seizure of real property subject to forfeiture by way of the Due Process Clause in light of the important governmental interests at stake.

II. THE FORFEITURE OF THE REAL PROPERTY ASSETS OF THE ILLICIT DRUG INDUSTRY SERVES THE STATES' COMPELLING INTEREST OF FIGHTING ILLEGAL DRUG TRAFFICKING.

A. The Forfeiture Of The Real Property Assets Of The Illicit Drug Industry Serves A Compelling Interest.

The forfeiture of the real property assets of the illicit drug industry in this country serves the states' compelling

interest in protecting the public from the ravages of the drug trade.[12] That drug traffickers and drug users cause inestimable damage to our nation is beyond cavil. There are, literally, millions of drug abusers in this country.[13]

The direct costs of illicit drug use are enormous and such costs fall heavily on the states. The direct costs of medical treatment for children whose mothers used cocaine during pregnancy are but one small example of the direct costs of illicit drug use in this country. 72 public and private hospitals in some 12 cities are caring for more the 7,000 "boarder babies" a year at a cost of $34 million a year.[14] Illicit drug use has also helped to spread the AIDS epidemic through this country's population. In New York City, public health officials estimate that 61 per cent of New York City's female AIDS cases and 37 percent of the male cases stem from using infected needles. At present, the lifetime cost of providing treatment for a single AIDS patient in this country is in excess of $100,000.[15]

The direct costs of illegal drug use are but a part of the entire toll the illicit drug industry exacts upon the public. Every part of this country suffers from the use of drugs and the related crime it spawns. Drug trafficking and drug use disintegrates entire communities and spawns a cycle of violence, weakened economies,

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[12]In 1990, 48% of all Americans polled considered drug use in their neighborhoods to be "very serious" or "somewhat serious." United States Department of Justice, *Sourcebook of Criminal Justice Statistics, 1991*, at 240.

[13]United States Department of Justice, *Drug Trafficking: A Report to the President of the United States*, p.2 (August 3, 1989).

[14]New York Times, July 26, 1992, at A16.

[15]New York Times, July 23, 1992, at B8.

suburban flight, joblessness and fear.[16] The illicit drug industry has helped create a pervasive culture of violence and despair in which the only measure of human achievement is material success through drug peddling.

Federal and state forfeiture laws are one important way the public can strike back, through their government, at the illicit drug industry. Nearly ten years ago, Congress recognized that the forfeiture of the real property assets of the illicit drug industry could be a powerful tool in the effort to stem the flow of illegal drugs in this country. Congress amended the federal civil forfeiture statute to expressly permit the forfeiture of the illicit drug industry's real property assets. Congress recognized that "the traditional sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence is plaguing the country.[17]" Congress also recognized that if efforts to combat the illegal drug trade are to be successful, "they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made."[18] Congress made it clear that it intended the forfeiture of real property to serve as a "powerful deterrent" to the illicit drug industry:[19]

> The extent of drug-related property subject to civil forfeiture under 21 U.S.C. 881 is also too limited in one respect. Under current law, if a person uses a boat or car to

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[16]National Crime Prevention Council, *Creating a Climate of Hope: Ten Neighborhoods Tackle the Drug Crisis*, p.1 (1992).

[17]S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374.

[18]*Id.*

[19]*Id.* at 3378.

> transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.

Congress was absolutely correct when it perceived that real property forfeiture can be a "powerful deterrent" to the illicit drug industry in this country. This powerful tool - real property forfeiture - serves the states' compelling interest in combatting the pernicious effects of illegal drugs on its victims and on society. The forfeiture of real property used in the illicit drug industry works on several levels to attack illegal drug trafficking.

The states have a pecuniary interest in such forfeitures since the forfeited property may be used by the government to finance anti-drug law enforcement efforts "and the Government's interest in using the profits of crime to fund these activities should not be discounted." *Caplin & Drysdale v. United States*, 491 US 617, 629 (1989). *See also, One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972). In recognition of the important role state and local law enforcement officers play in the anti-drug effort, Congress has provided that property forfeited pursuant to the federal statute may be transferred "to any state or local law enforcement agency which participated in the seizure or forfeiture of the property; ...." 21 U.S.C. 881(e)(1).[20]

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[20]The statute incorporates the procedural provisions of the federal customs forfeiture laws set out in 19 U.S.C. § 1602 - 1619 "insofar as applicable and not inconsistent with the provisions" of § 881. *See*, 21 U.S.C. § 881(d). Additionally, 19 U.S.C. § 1616a provides that the forfeited property may be transferred to any participating local law enforcement agency.

The forfeiture of the real property assets of the illicit drug industry is an important tool which furthers a compelling governmental interest. That governmental interest is, of course, the need to protect its citizenry from the ravages of illegal drugs. That interest is advanced by attacking the assets of the illicit drug industry through the forfeiture laws. As the Court has previously observed, forfeiture of property used in violation of the drug laws fosters the purposes served by the underlying criminal statutes by preventing further illicit use of the property and by imposing an economic penalty rendering the illegal behavior unprofitable. *Calero - Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 687 (1974). If our efforts to fight drug trafficking are to have any chance of success, an attack on the economic bases of the drug industry must be made. Forfeiture is the way by which the states may make such an attack.

B. The Forfeiture Of Property Associated With Criminal Activity Is A Principle Well Established In The Jurisprudence Of This Country.

Both federal and state officials have increasingly used civil forfeitures as part of their efforts against the illicit drug industry.[21] The forfeiture of property used in criminal activities, including real property used for criminal endeavors, is a principle well established in the law of this country, and is deeply rooted in tradition.

The notion of forfeiture of property originated in Biblical times through the religious atonement practice of

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[21]New York Times, October 14, 1986, at B1.

deodand.[22] The ancient Greek[23] and Roman[24] societies similarly adopted the concept of the deodand as compensation for injured persons. The early notions of forfeiture were based on the belief that property causing injury or death became tainted with evil requiring expulsion of the property in order to protect society.[25] However, over time the concept of deodand lost its religious meaning and came to be used as a way to generate revenue for the sovereign.[26] The English common law theory was that property which caused injury

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[22]"[I]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten." Exodus 21:28. The term deodand comes from the Latin phrase *deo dandum*, which means a thing to be given to God. Black's Law Dictionary 392 (5th ed. 1979). The Biblical rule in effect commanded that the ox be forfeited to God.

[23]O.W. HOLMES, THE COMMON LAW 7-8 (1881). Ancient Greek law contained many provisions concerning the forfeiture of objects associated with wrongdoing. *Id*. If an animal or an inanimate object caused death it was to be cast beyond the borders. *Id*. at 8. Two centuries after Christ, Pausaias observed that "they still sat in judgment on inanimate things in the Prytaneum." *Id*.

[24]1 S. SCOTT, THE CIVIL LAW 69 (1932). Provisions for forfeiture under ancient Roman law may be found as far back as 451 B.C. *Id*. "[I]f a quadruped causes injury to anyone, let the owner ... surrender the animal that caused the injury." *Id*.

[25]1 W. BLACKSTONE, COMMENTARIES 299-300 (1897).

[26]O.W. HOLMES, *supra* note 2, at 15-24. In early English common law, if an object accidentally caused the death of one of the King's subjects, it was forfeited to the Crown and was used to pay for Masses said on behalf of the deceased subject. Finklestein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169, 180-181 (1973). This religious remedial purpose was, however, ultimately discarded and the practice became simply a way to generate revenue for the state. *Id*.

committed a breach of the King's peace and was, accordingly, subject to forfeiture to the sovereign.[27]

In this country, the forfeiture of property associated with criminal activity has been long recognized.[28] While the early American courts declined to recognize the deodand concept of forfeiture, "[l]ong before the adoption of the Constitution the common law courts in the Colonies - and later in the states during the period of Confederation - were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes." *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1942). These early colonial statutes provided for the forfeiture of commodities and vessels used in violation of the customs and revenue laws. *C.J. Hendry*, 318 U.S. at 148. After the American Revolution, some of the earliest legislation by Congress included forfeiture provisions.[29]

Since the enactment of the earliest forfeiture statutes, civil forfeiture proceedings have been regarded as against the property, or *in rem*. *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 23-24 (1807). In *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), a Spanish ship was seized under claims of piracy in violation of federal law. *The Palmyra*, 25 U.S. at 8. While the acquittal of the piracy claim was upheld, the Court explained that the civil

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[27]1 W. BLACKSTONE, *supra* note 4, at 299. The convicted felon, under English Common Law forfeited his chattels to the Crown and his real property escheated to his lord; the convicted traitor forfeited all of his real and personal property to the Crown. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 68-71 (2d ed. 1927); 1 F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1909).

[28]Deodands did not become part of the common-law tradition of the United States. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 188 S.W. 54 (1916).

[29]Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 74, 1. Stat. 157, 161, 163, 176, 179.

forfeiture proceeding was against the property itself. *The Palmyra*, 25 U.S. at 14-15. As the Court explained, "[t]he thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum phohibitum, or malum in se ... the practice has been, and so this Court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in person." *Id*. As the Court has observed concerning the rationale behind civil forfeiture, whether it is "artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *J.W. Goldsmith, Jr. - Grant Co. v. United States*, 25 U.S. 505, 511 (1921).

The forfeiture of real property used in criminal activity through civil forfeiture proceedings was considered by the Court well over a century ago in *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878). In that case, a landlord's personal and real property was seized and ultimately forfeited to the United States due to the tenant's operation of an illegal distillery on the leased premises. The forfeiture of the landlord's personal and real property was upheld by the Court since the proceeding was a civil in rem action under which Congress attached the offense to the distillery. Justice Clifford, writing for the Court, observed that "the act of Congress in question attaches the offense to the distillery, and the real and personal property connected with the same, ..." and that violation of the statute required that "the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property used in the business, shall be forfeited to the United States. 15 Stat. 133." *Dobbins Distillery*, 96 U.S. at 400-401.

Congress recognized well over a hundred years ago, when it authorized the forfeiture of the real property of illegal distilling operations, that the seizure and forfeiture of real property used in such activities could prevent further illegal use and impose an economic penalty for such illegal use. Similarly, the legislative

decision to authorize the seizure and forfeiture of the real property assets of the illicit drug industry in this century reflects a recognition that such forfeitures will help prevent the further use of such real property in the illicit drug industry and impose an economic sanction on that illegal industry. Seizure and forfeiture of the real property assets of the illicit drug industry is based upon a principle of law well established in the jurisprudence of this country.

CONCLUSION

For the reasons stated above, the states respectfully request this Court to hold that the Due Process Clause of the Fifth Amendment does not require notice and hearing *prior* to the seizure of real property subject to forfeiture for violation of drug laws. The forfeiture of the real property assets of the illicit drug industry furthers the compelling interest of fighting illegal drug trafficking; the Ninth Circuit's unwarranted interpretation of the Due Process Clause in this case will only serve to frustrate that compelling government interest.

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